No. 3109

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PACIFIC MAIL STEAMSHIP COMPANY,
(a corporation),
Plaintiff in Error,

vs.

THE WESTERN PACIFIC RAILROAD COMPANY,
(a corporation),
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

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C. W. DURBROW,
Of Counsel.

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Statement of the Case.

The defendant in error, plaintiff in the Court below, instituted this action to recover the sum of $7,341.46, representing the amount accruing to defendant in error, as the inland proportion of freight charges on through shipments moving between points in the United States and Oriental ports.

Demurrers were sustained by the District Court to the original, first amended and second amended answers, interposed by the defendant in the District Court, and an order was entered for judgment

on the pleadings in favor of the defendant in error and against the plaintiff in error for the sum of $8,235.08, together with interest and costs.

In the answer and separate answer contained in the second amended answer, plaintiff in error admitted that the sum of $5,233.08 of the amount claimed was due and payable to the defendant in error, but denied that any sum exceeding this amount had, at any time, become due, or was payable, to defendant in error. The answer averred that plaintiff in error had tendered to defendant in error the sum of $5,233.08, and that defendant in error had refused to accept this sum unless plaintiff in error paid to defendant in error the sum of $2,069.25 in addition thereto.

The defendant in the Court below incorporated in its answers a separate answer to plaintiff's complaint as an offset to plaintiff's demand.

The shipments specified in the second amended answer were transported by the rail and water carriers between points in the United States and Oriental ports, the interchange between the rail and ocean carriers being effected at the port of San Francisco, at Piers 42 and 44.

In the separate answer contained in the second amended answer, plaintiff in error pleaded as an offset to the claim made by defendant in error that the terminal tariffs of the defendant in error, published and filed as required by the Act to Regulate Commerce, provided that defendant in error would absorb State toll on the shipments specified in the

second amended answer, and it was alleged that these terminal tariffs, while published by defendant in error, were applicable to import and export cargo interchanged by the parties at Piers 42 and 44.

The answer further averred that plaintiff in error had transported the shipments specified in the second amended answer between the port of San Francisco and Oriental ports, the shipments being received and delivered at Piers 42 and 44; and that under the rules of the Board of State Harbor Commissioners of the port of San Francisco plaintiff in error was required to initially pay the charges assessed for State toll; and that these charges were paid by plaintiff in error for the defendant in error, with the knowledge of defendant in error and "according to the general custom then existing at the port of San Francisco * * *", the charges aggregating the sum of $2,069.25, and that plaintiff in error also paid the freight charges of defendant in error on 30 packages transported by plaintiff in error and delivered to defendant in error, amounting to a total of $2,108.38, no part of which has been paid by defendant in error to plaintiff in error.

That the plaintiff in error tendered and offered to pay to the defendant in error the difference between $7,341.46, the amount collected by the plaintiff in error, as hereinbefore stated, and the amount due from defendant in error to plaintiff in error on account of the State tolls paid by the plaintiff

in error, and freight charges paid by plaintiff in error for defendant in error.

The offer and tender of the plaintiff in error to pay to defendant in error the sum of $5,233.08 was renewed and affirmed, and plaintiff in error prayed judgment for the sum of $2,108.38.

Judgment, as has been stated, was awarded defendant in error for the full amount of the claim, including the amount of $5,233.08 tendered by plaintiff in error to defendant in error, and for interest and costs, whereupon plaintiff in error brought the case to this Court by writ of error.

Specifications of Errors Upon Which Plaintiff in Error Relies.

There are eleven specifications in the assignment of errors contained in the transcript (Tr. pp. 47-51), many of the specifications being, however, to the effect that it was error to sustain the demurrer interposed by defendant in error, and to grant its motion for a judgment on the pleadings, upon the ground that the answer did not constitute a sufficient answer or defense, and that the separate answer interposed by plaintiff in error and the offset therein set forth did not constitute a sufficient answer to the complaint and action, and did not constitute, and was not a legal, or sufficient or any offset to or against the demand of defendant in error, or the cause of action of defendant in error to entitle

plaintiff in error to offset the amount of the demand specified in said complaint and that, therefore, error was committed by the trial court in awarding any judgment to plaintiff without offsetting against and deducting from the demand of defendant in error the offset pleaded by plaintiff in error; and that the Court erred in holding and deciding that plaintiff in error was not entitled to have and recover against defendant in error a judgment for the amount of State tolls, which plaintiff in error alleged in its separate answer to have been paid by plaintiff in error for and to the use and benefit of the defendant in error, and in deciding and holding that defendant in error did not, in its tariffs, specified in the separate answer, assume and agree to absorb and pay the State tolls which had been paid by plaintiff in error, and in holding that defendant in error was not legally liable for, and should not be required to pay or refund to plaintiff in error the State tolls paid by plaintiff in error for the defendant in error, as alleged in the separate answer of plaintiff in error.

Plaintiff in error further relies upon the specification that the Court erred in not holding and deciding that the second amended answer of plaintiff in error contained sufficient denials of material allegations of the complaint, and that the material facts stated in the separate answer and offset contained in said separate answer were not sufficient and did not state a sufficient and legal answer to said complaint, entitling plaintiff in error to a judgment in

its favor offsetting against and deducting from the claim and demand of the defendant in error the sums and amounts specified in said separate answer, alleged to have been paid by plaintiff in error for the use and benefit, and with the knowledge, of defendant in error, and according to the general custom for the payment of State tolls and which, by its tariffs, said defendant in error had agreed to absorb and pay, and in not holding that defendant in error was legally entitled to recover a judgment only for the balance of its claim, which plaintiff in error had tendered to defendant in error and agreed to pay, as alleged in said separate answer, and in holding that defendant in error was legally entitled to have or receive or recover judgment for any interest upon the balance of the said claim.

Plaintiff in error further relies upon the specification that the Court erred in adjudging that defendant in error recover any interest upon the amount of the claim made by the defendant in error which plaintiff in error had offered and tendered to defendant in error, and which defendant in error refused to accept.

Plaintiff in error further relies upon the specification that the Court erred in holding and deciding that defendant in error was not legally bound and required to absorb and to refund and pay to plaintiff in error the sums paid by plaintiff in error for State tolls for the use and benefit and with the

knowledge of defendant in error and according to the general custom at the port of San Francisco, and in holding that defendant in error had not agreed by its said tariffs to absorb or pay said State tolls upon said traffic, and in holding that plaintiff in error was legally obligated or required to pay said tolls on said traffic under the provisions of said tariff and rules of the Harbor Commissioners of the port of San Francisco.

Argument.

THE ISSUES.

Plaintiff in the Court below demanded judgment for the sum of $7,341.46, representing the amount collected by defendant in the Court below as the rail proportion accruing to the defendant in error (plaintiff below) on through freight shipments from interior points in the United States to Oriental destinations. This fact is not in dispute.

In its separate answer, plaintiff in error sought to offset against this claim the sum of $2,069.25, representing the amount which plaintiff in error had paid to the State of California for and on behalf of defendant in error on account of State tolls assessed under the rules of the Board of State Harbor Commissioners for the port of San Francisco, and also the sum of $39.13, representing an amount due the ocean carrier from the rail carrier for

services rendered by the ocean carrier in transporting freight shipments for the rail carrier on its steamers from the port of San Francisco to Oriental ports. It was specifically alleged in the separate answer that the Steamship Company had tendered the Railroad Company the sum of $5,233.08, or the difference between the amount claimed by the defendant in error and the amount sought to be offset by the plaintiff in error.

The amount in controversy, therefore, is the sum of $2,108.38.

The sole questions presented to the Court for determination are whether the plaintiff in error was entitled to offset the sum of $2,108.38 against the amount demanded by the complaint, and whether the allegations contained in the second amended answer constituted a defense and offset; and whether defendant in error was or is entitled to any interest in view of the tender and offers of payment made by plaintiff in error as alleged in its Answer (Tr. p. 30) and Separate Answer (Tr. pp. 37-38).

No question was or is made that, in an action such as this, the plaintiff in error was not lawfully entitled, under the rules of Pleading and Practice, to interpose a separate answer, pleading an offset; but by its demurrer to the second amended answer, defendant in error raised the question as to the sufficiency of the facts pleaded in the second amended answer to constitute a defense, offset, or counterclaim.

THE SEPARATE ANSWER AND THE OFFSET PLEADED THEREIN CONTAIN ALLEGATIONS SUFFICIENT TO CONSTITUTE AN ANSWER TO THE COMPLAINT AND AN OFFSET THERETO.

The facts contained in the pleadings.

The Pacific Mail Steamship Company, the plaintiff in error, is engaged in the business of transporting passengers and freight between the port of San Francisco and Oriental ports, cargo being received and discharged at Piers 42 and 44 at the port of San Francisco.

The defendant in error is a common carrier of freight and passengers between eastern points in the United States and the port of San Francisco, its western terminus. (Tr. p.31.)

During the period involved in the controversy, the defendant in error published and filed with the Interstate Commerce Commission, as required by the Act to Regulate Commerce and the rules of the Commission, its terminal tariffs, providing for the absorption by defendant in error, among other charges, of the State tolls assessed by the Board of State Harbor Commissioners for the port of San Francisco, on shipments originating or delivered at wharves served by the Southern Pacific Company, the Atchison, Topeka & Santa Fe Railway Company, or the Belt Line Railroad, "on all competitive traffic" originating at or destined to Oriental ports, in cases where the Western Pacific Railroad Company "receives the line haul". The express provisions of these terminal tariffs, providing for the absorption of the State tolls, by

defendant in error, are set forth in full at pages 32, 33 and 34 of the transcript.

During the years 1911, 1912, 1913, 1914 and 1915 plaintiff in error transported specified shipments routed over the line of defendant in error between the port of San Francisco and Oriental ports, said shipments being received from or delivered to Piers 42 or 44, and all of such traffic being "competitive traffic" as defined by the terminal tariffs of defendant in error. (Tr. pp. 31-35.)

Plaintiff in error, in compliance with the rules of the Board of State Harbor Commissioners for the port of San Francisco, paid the State tolls on said shipments received from and delivered to Piers 42 and 44, for and on account of the defendant in error, with the knowledge of defendant in error, and "according to the general custom then existing at said port of San Francisco", these charges for State tolls amounting to $2,069.25.

Plaintiff in error also paid the freight for defendant in error on 30 packages carried by plaintiff in error and delivered to defendant in error, making $2,108.38 paid by plaintiff in error for and on behalf of defendant in error and with the knowledge of defendant in error. (Tr. pp. 35, 36.)

Plaintiff in error collected $7,341.46 on certain shipments originating at Manila, which were transported from that port to San Francisco by plaintiff in error, and there delivered to defendant in error, this amount representing the freight accruing on

such shipments to defendant in error for transporting such shipments from the port of San Francisco to their final eastern destinations; and plaintiff in error retained out of the amount so collected the sum of $2,069.25, representing the amount of State tolls which defendant in error under its terminal tariffs agreed to absorb and which had been paid by plaintiff in error to the State Board of Harbor Commissioners for the port of San Francisco for the use and benefit of defendant in error, and also retained freight charges of $39.13, a total of $2,108.38.

Plaintiff in error tendered and offered to defendant in error the balance and remainder of the $7,341.46, or the sum of $5,233.08, and plaintiff in error has at all times held itself ready, willing and able to pay this amount to defendant in error, without prejudice to any rights of defendant in error to insist upon its claim of $2,108.38, and "with the absolute right of the plaintiff (defendant in error) to use and apply said $5,233.08 to its own use, as it should see fit, and without any right or claim by defendant (plaintiff in error) on or to said $5,233.08, or for repayment thereof". (Tr. pp. 36, 37, 38.)

All of these import and export shipments were received from and delivered to defendant in error by plaintiff in error at Piers 42 and 44, and at the wharves served by the Southern Pacific Company, The Atchison, Topeka & Santa Fe Railway Company and the Belt Line Railroad, as specified in the terminal tariffs of defendant in error, "at which

and upon which cargo as agreed and stated by plaintiff (defendant in error) * * * in the said tariffs, plaintiff (defendant in error) * * * 'also will absorb State tolls' * * *''; and that the State tolls paid by plaintiff in error for and on behalf of defendant in error were the State tolls "which under and as stated in said terminal tariffs were to be charged to and absorbed by plaintiff (defendant in error) * * * as and for a part and portion of its proportion of said through rate", as provided in its terminal tariffs. (Tr. pp. 38, 39.)

The Law Applicable to the Case.

JURISDICTION OF THE INTERSTATE COMMERCE COMMISSION.

The Western Pacific Railroad Company, the defendant in error, is concededly subject to the jurisdiction of the Interstate Commerce Commission, and embraced within the Commission's jurisdiction are the rates charged for main line hauls on all shipments transported by the Western Pacific to and from the port of San Francisco which, as in the case of the shipments in question, were in transit to or from foreign ports, and also "all services in connection with the receipt, delivery, * * * transfer in transit, and handling of property transported".

Act to Regulate Commerce, approved February 4, 1887, 24 Statutes at Large 379; as amended by an Act approved March 2, 1889, 25 Statutes at Large, 855; by an Act approved

February 10, 1891, 26 Statutes at Large, 743; by an Act approved February 8, 1895, 28 Statutes at Large, 643; by an Act approved June 29, 1906, 34 Statutes at Large, 584; by a joint resolution approved June 30, 1906, 34 Statutes at Large, 838; by an Act approved April 13, 1908, 35 Statutes at Large, 60; by an Act approved February 25, 1909, 35 Statutes at Large, 648; by an Act approved June 18, 1910, 36 Statutes at Large, 539; by an Act approved August 24, 1912, 37 Statutes at Large, 566; by an Act Approved March 1, 1913, 37 Statutes at Large, 701; by an Act approved March 4, 1915, 38 Statutes at Large, 1197; by an Act approved August 9, 1916, 39 Statutes at Large, 441; and by an Act approved August 29, 1916, 39 Statutes at Large, 556.

Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498;

R. R. Comm. of Ohio v. Worthington, etc., et al., 225 U. S. 101;

T. & N. O. R. R. Co. v. Sabine Tram Co., 227 U. S. 111.

Under the provisions of Section 6 of the Act to Regulate Commerce, as amended, every common carrier subject to the Act to Regulate Commerce is required to file with the Interstate Commerce Commission schedules showing rates and charges for transportation between points on its line and points on the lines of its connecting carriers, and also to "state separately all terminal charges * * * all privileges or facilities granted or allowed, and any rules or regulations which in anywise change, affect or determine any part or the aggregate of such aforesaid rates, fare and charges, or the value of

the services rendered to the passenger, shipper or consignee * * *".

Under the provisions of the Interstate Commerce Act, terminal charges must be published separately.

Stickney v. I. C. C., 164 Fed. 638; Affirmed, 215 U. S. 98.

It has been held by the Supreme Court of the United States that a published tariff, so long as it is in force, has the effect of a statute and is binding alike on the carrier and the shipper.

Pa. R. R. Co. v. International Coal Mining Co., 230 U. S. 184;

Dayton Coal & Iron Co. Ltd. v. C. N. O. & T. P. R. Co., 239 U. S. 446

It has been held by the Interstate Commerce Commission and by the Supreme Court of the United States that the Congress has not confided to the Interstate Commerce Commission any jurisdiction over the ocean carriage of through shipments moving by rail between interior points in the United States and ports in connection with the steamer haul from the port to non-adjacent foreign country.

Cosmopolitan Shipping Co. v. Hamburg-American Packet Line, 13 I. C. C. 266;

Armour Packing Co. v. U. S. 209 U. S. 56.

It thus appears that it has been judicially established by the Court of last resort and by the Interstate Commerce Commission, which is charged with the administration of the law, that the Commission has no jurisdiction over the ocean transit on ship-

ments moving via combined rail and steamer haul, but that the Commission has been vested with jurisdiction so far as the inland rail haul is concerned, and that *this jurisdiction,* as has already been shown, *extends not only to the main line rates but to the terminal charges made by the carriers for all services connected with receiving and delivering shipments.*

DEFENDANT IN ERROR AGREED TO ABSORB THE STATE TOLL ASSESSED ON THE SHIPMENTS IN QUESTION.

Pursuant to the authority vested in it by the Act, the Interstate Commerce Commission has promulgated rules relating to the manner in which tariffs must be published and filed, and what charges may be specified and embraced therein, and has incorporated in its published tariff rulings a rule relating to ocean carriers and export and import tariffs, as follows:

> "Ocean carriers between ports of the United States and foreign countries *not adjacent* are not subject to the terms of the Act to regulate commerce; nor to the jurisdiction of the Commission.
>
> (a) The inland carriers of traffic exported to or imported from a foreign country not adjacent must publish their rates and fares to the ports and from the ports, and such rates or fares must be the same for all, regardless of what ocean carrier may be designated by the shipper or passenger.
>
> (b) As a matter of convenience to the public said carriers may publish in their tariffs such through export or import rates or fares to or

from foreign points as they may make in connection with ocean carriers. Such tariffs must, however, distinctly state the inland rate or fare as above provided, and need not be concurred in by the ocean carrier, because concurrence can be required from, and is effective against, only carriers subject to the Act."

(Regulations of the I. C. C. to govern the construction and filing of freight tariffs, etc., approved February 13, 1911, Rule 71, p. 104.)

We have heretofore set forth the substance of the terminal tariffs published by the defendant in error, providing for the absorption of the State toll assessed on shipments moving over the wharves served by the carriers operating at the port of San Francisco. These tariff provisions provide that the defendant in error will absorb the State toll assessed at such wharves, and in view of the fact that the Interstate Commerce Commission can exercise no jurisdiction with reference to the ocean carriage, it must be held that the purpose for providing for such absorptions in the terminal tariffs was to lawfully permit the *defendant in error* to make the absorptions of the State toll out of the rates received by that carrier for performing the main line haul.

Counsel for defendant in error, in presenting the argument in the District Court in support of the demurrer and motion for judgment on the pleadings, contended that the rules published in the terminal tariffs filed by the Western Pacific Railroad Company, set forth in the second amended answer, were designed to provide for the absorption of

State toll assessed on shipments moving into and out of San Francisco, over the wharves, when transported by the freight barges of that line, and that they did not relate to the absorption of the charges assessed by the Board of State Harbor Commissioners for the port of San Francisco in cases where shipments of export and import freight were handled over the wharves in connection with the steamer line.

If the tariff publications were designed to accomplish this purpose, why did the terminal tariffs filed by the defendant in error not restrict the absorptions of State toll to traffic received by and delivered to its barges at San Francisco, instead of specifying that the "Western Pacific Railroad * * * also will absorb State toll to and from wharves served * * * by the Southern Pacific Company, the Atchison, Topeka & Santa Fe Railway Company and the State Belt Railroad Company * * * on all traffic originating at, destined to, or routed via points in Alaska, Australia, China, Hawaiian Islands, Japan, Philippine Islands, New Zealand, South America * * * and north thereof, on the one hand, and on the other hand, originating at or destined to Ogden, Salt Lake City or Garfield, Utah, and points east thereof." (Tr. pp. 31-34.)

It is alleged in the second amended answer that Piers 42 and 44 were served by the rails of the Southern Pacific Company, and that the shipments in question were competitive traffic of the character specified in terminal tariffs filed by the defendant

in error. How then can it be argued that the charges should be absorbed only on traffic moving over the wharves when received by or delivered to the wharves by the barges of the defendant in error? Its barges have at no time served Piers 42 or 44. These piers were and are the piers of the Pacific Mail Steamship Company, and are served by the rails of the Southern Pacific Company and not by the barges of the defendant in error.

It must be held that the facts pleaded in the separate answer conclusively show that the defendant in error agreed to absorb the State toll on the shipments specified therein.

PLAINTIFF IN ERROR PAID THE STATE TOLL ASSESSED ON THE SHIPMENTS IN QUESTION, FOR AND ON BEHALF OF DEFENDANT IN ERROR, WITH ITS KNOWLEDGE, AND IN ACCORDANCE WITH THE CUSTOM OBTAINING AT THE PORT OF SAN FRANCISCO.

It is alleged in paragraph 3 (tr. 35) of the separate answer contained in the second amended answer of plaintiff in error that under the rules of the Board of State Harbor Commissioners for the port of San Francisco, the tolls for the cargo received on board from the defendant in error and delivered on said Piers 42 and 44 from the vessels of plaintiff in error for defendant in error were required to be paid by the vessels of plaintiff in error "receiving and/or discharging such cargo, and accordingly and for the plaintiff (defendant in error) and for the use and benefit of the plaintiff

(defendant in error), the defendant (plaintiff in error) paid the State tolls for plaintiff (defendant in error), with the knowledge of plaintiff (defendant in error) and according to the general custom then existing at the said port of San Francisco, on said import and export cargo of five cents per ton". (Tr. pp. 35, 36.)

By conventional arrangement, the parties provided for interchanging export and import traffic transported over their respective rail and steamer lines, and the custom obtaining at the port where the shipments were thus interchanged is controlling in the absence of a complete express agreement relating to the manner in which the ocean carrier should initially pay the charges assessed for State toll, and for the repayment thereof to the ocean carrier by the rail carrier. The parties are presumed to have contracted with reference to the manner in which these charges should be initially paid and repaid in accordance with the general usage and custom at the port of San Francisco.

The F. J. Luckenbach, 213 Fed. 670;

Continental Coal Co. v. Birdsall, 108 Fed. 882;

Steidtmann v. The Joseph Lay Co., 234 Ill. 84;

C., R. I. & P. Ry. Co. v. Dodson, 107 Pac. 921.

It therefore appears from the allegations contained in the second amended answer interposed by plaintiff in error that defendant in error provided

in its terminal tariffs to absorb State toll on the shipments specified in the answer; and that in compliance with the rules of the Board of State Harbor Commissioners for the port of San Francisco, plaintiff in error made the initial payment of these charges, with the knowledge of defendant in error and in accordance with the custom obtaining at the port of San Francisco. Therefore, the Court must reach the inevitable conclusion that the charges assessed for State toll were paid by the plaintiff in error for and on behalf of the defendant in error, and that, in accordance with the custom at the port of San Francisco, such charges should have been refunded by defendant in error to plaintiff in error, and that plaintiff in error was legally entitled to withhold the amount paid for State toll for and on behalf of defendant in error, and that the amount of State tolls thus paid by plaintiff in error for and on account of defendant in error, with its knowledge, and in accordance with the custom at the port of San Francisco, is a proper offset against the claim made by the defendant in error in its complaint.

It was argued by counsel for defendant in error in the District Court that the question of the initial payment of the State toll by plaintiff in error for and on account of defendant in error and the liability of defendant in error to repay to the plaintiff in error the amount of State toll so paid by plaintiff in error were questions between the parties litigant, with which shippers had no concern, and were

questions in which the Interstate Commerce Commission was not interested, and concerning which the rules of the Interstate Commerce Commission did not apply.

The Act to Regulate Commerce itself, the authorities, and the Commission's rules, to which reference has hereinbefore been made, disclose how carefully Congress, and the Commission charged with the proper administration of the Act to Regulate Commerce, have sought to disassociate and distinguish the rail and ocean carriage of shipments involving a combined rail and ocean haul; and moreover, the Act requires the carriers within the jurisdiction of the Commission, in addition to publishing and filing tariffs relating to rates covering the main line haul, to separately publish and file tariffs showing terminal charges and "any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, fares and charges, or the value of the service rendered to the passenger, shipper, or consignee". (Sec. 6, supra.)

In compliance with this provision of the statute, the defendant in error published in its terminal tariffs the fact that it would absorb the charges assessed for State toll on competitive traffic upon which it received the line haul, destined to or received at wharves served by the Southern Pacific Company, the Atchison, Topeka & Santa Fe Railway Company, and the State Belt Railroad, and

the rate of the ocean carrier was stated in its main line tariffs.

If these absorptions had not been published, the shippers would have been informed that they were obliged to pay:

1st. The main line rate;

2nd. The switching charge;

3rd. The State Belt toll; and

4th. The rate of the ocean carrier.

But for competitive reasons the defendant in error undertook to absorb the switching charge and the State toll, in order to place the port of San Francisco on a parity with other Pacific Coast ports, and in order to make the aggregate rail charge for the inland proportion of the haul commensurate with the charges paid by the shippers who might route their shipments through other Pacific Coast ports.

The primary object sought to be accomplished by the Act to Regulate Commerce is to prevent discrimination.

Armour Packing Co. v. U. S., supra;
Kansas City So. Ry. Co. v Carl, 227 U S. 639;
Phillips v. Grand Trunk Ry. Co., 236 U. S. 662;
G. F. & A. Ry. Co. v. Blish Milling Co., 241 U. S. 190.

In order to accomplish this purpose, the Commission has been vested with power to require the carriers to keep their accounts in compliance with

uniform rules promulgated by the Commission as provided by Section 20 of the Act to Regulate Commerce. In compliance with this section, it is incumbent upon the defendant in error to account to the Commission as required by Section 20 and the rules promulgated by the Commission for all absorptions of whatever kind, character or description.

It is further incumbent upon the defendant in error to comply literally with the provisions of its tariffs filed with the Commission. As has been shown, such tariffs when filed have all the force of law.

Pa. R. R. Co. v. International Coal Mining Co., 230 U. S. 184;

Dayton Iron Co. v. C. N. O. & T. R. Co., 239 U. S. 446, 449.

Having voluntarily agreed to make the absorption of the State toll, the defendant in error is obliged in fact to make such absorption, and account therefor. By Conference Ruling No. 7, promulgated by the Commission in its Conference Rulings Bulletin No. 7, page 123, it is provided:

> "The absorption of drayage charges being under consideration, the Commission holds:
>
> (a) Where there is an additional transfer or drayage charge in connection with a through shipment, the carriers' tariffs must specify what that charge will be.
>
> (b) If such drayage or transfer charge is absorbed, in whole or in part, by a carrier, the tariffs must show the amount of such transfer charge that will be absorbed.

> (c) A drayage firm is not a proper party to a joint tariff nor is it a carrier under the provisions of our act; therefore, no tariffs can properly be filed by it."

Reasoning by analogy, the absorption of the State toll, which is an additional charge in connection with a through shipment, the tariffs of the carriers subject to the jurisdiction of the Commission, in order to absorb such charge, must show the amount of the charge thus absorbed, and the connecting carrier which is not subject to the jurisdiction of the Commission cannot file such tariffs. The principle announced by the Commission should be applied here, and the absorption published in the tariffs of the rail carrier should be, as they were intended to be, absorbed by the rail carrier. The voluntary assumption of the obligation to make this absorption cannot be satisfied by the ocean carrier making such absorption out of its own rates.

It cannot therefore be successfully contended that this is a question in which the shippers or the Commission have no concern or interest.

To permit the defendant in error to depart from its tariffs would enable the defendant in error to open wide the door to discrimination by making absorptions in one case for certain shippers, and declining to make absorptions in other cases for other shippers, and would do violence to the plain provisions of the statute.

It is submitted that the separate answer contained in the second amended answer interposed by plain-

tiff in error contains sufficient allegations to constitute an answer to the complaint and an offset thereto, because it avers:

That defendant in error voluntarily agreed to absorb State tolls on the shipments specified in the answer;

That the defendant in error provided for making these absorptions out of its revenues derived from the main line haul on these shipments;

That the plaintiff in error made initial payment of the amounts assessed by way of State toll, for and on behalf of the defendant in error, with its knowledge, and in accordance with the custom obtaining at the port of San Francisco; and further,

That to permit defendant in error to retain the amount of the absorptions which it obligated itself to make would violate the provisions of the Act to Regulate Commerce, and cause plaintiff in error to abate from its charges the rates which it lawfully earned, and compel plaintiff in error to assume a loss of revenue which loss had voluntarily been assumed by defendant in error.

INTEREST SHOULD NOT HAVE BEEN ALLOWED.

In view of the tenders and offers of payment alleged in the Answer and Separate Answer, it was error to allow interest to defendant in error,

especially upon the amount tendered and offered to be paid to defendant in error.

The judgment of the District Court should be reversed.

Dated, San Francisco,
February 18, 1918.

Respectfully submitted,

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